

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK ANDERSON,

Defendant-Appellant.

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UNPUBLISHED

January 27, 2011

No. 295291

Wayne Circuit Court

LC No. 09-020217-FH

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, brandishing a firearm in public, MCL 750.234e, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We reverse defendant's conviction for felon in possession of a firearm but affirm his remaining convictions, and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Complainant Xavier Smith went to his sister's house on Whitehill in response to a phone call that another sister had been beaten. Defendant, who was among those present in front of the home, was arguing with Smith's nephew and, at some point, stated that he wanted to fight Smith's sister's boyfriend. Smith testified that as this occurred while he stood on the porch of the home, he saw a red car pull up next to the car where defendant stood. A man wearing a black t-shirt "jump[ed]" out of the car, armed with an AK-47 rifle, and ran to the corner of the driveway. Defendant then went to the "back seat" of the car and pulled out another AK-47. According to Smith, he and his sister, among others, called 911 while defendant approached Smith, his sister, and others on the porch and, while holding the firearm, threatened to shoot them. Complainant stated that defendant approached from about 35 to 40 feet away and got within five feet of him. The police arrived, and the man in the black T-shirt, who complainant stated no longer had his own gun, took defendant's AK-47 and ran into another house. The 911 calls were also played for the jury.

Detroit Police Officer Mackenzie testified that he responded to a call about a "large fight in progress" at Whitehill and Moran. When he arrived, he saw two groups of people outside yelling at each other. He yelled at the people to be quiet, but they did not comply. After defendant continued to act in an unruly manner, Mackenzie handcuffed defendant and arrested

him for disorderly conduct. Mackenzie placed defendant in the patrol car, and spoke with complainant and Latricia Smith, both of whom told him that defendant had an AK-47 and had pointed it at them and threatened them. Mackenzie did not find a gun, and did not enter the home where the guns were allegedly taken, ostensibly because he did not have a warrant. Detroit Police Detective Christensen testified that police searched 12175 Whitehill, which was believed to be defendant's residence, but did not recover a firearm.

Defendant first argues that his conviction for felon in possession of a firearm must be reversed because the prosecution failed to present evidence at trial that defendant had previously been convicted of a felony. We agree.

We review a defendant's allegations regarding insufficiency of the evidence de novo. We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992); *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In order to support a conviction for felon in possession, the prosecution must show that the defendant possessed a firearm, had previously been convicted of a felony, and had not met the statutory conditions for regaining his eligibility to possess a firearm, with the prosecution responsible for proving this last element only if the defendant produces some evidence that his right has been restored. MCL 750.224f; *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004). The prosecution concedes that it did not present proof that defendant had previously been convicted of a felony. Nor did defendant stipulate to the existence of this element of the offense. Thus, as the prosecution acknowledges, the prosecution failed to present sufficient evidence to support this conviction.

Because defendant's felon in possession conviction was the conviction scored for defendant's sentencing information report and formed the basis for defendant's sentences, we find that defendant is entitled to resentencing on his remaining convictions.

Defendant further argues that his remaining convictions must also be reversed because the prosecution failed to present sufficient evidence that defendant possessed a firearm during the altercation. We disagree. Complainant testified that defendant took a firearm from the interior of the car that drove up as defendant was involved in a verbal altercation, advanced on complainant and his family while pointing the firearm at them, and threatened to harm them while doing so. In addition, Officer Mackenzie testified that he spoke with complainant and Latricia Smith, and that both told him that defendant had an AK-47, and pointed it at them and threatened them. Defendant contends that complainant was not credible because of the inconsistencies between his trial testimony and the testimony of Mackenzie, who did not find a weapon when he responded to the 911 calls, and the fact that no firearm was found in a

subsequent search of defendant's home. However, on this point, the jury was free to believe complainant's testimony. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Defendant has not shown that he is entitled to reversal of his convictions on the ground that the prosecution presented insufficient evidence.

Defendant further argues that trial counsel provided ineffective assistance when counsel stipulated to the introduction of recordings of the 911 calls made concerning the incident. Defendant did not move for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*<sup>1</sup> hearing before the trial court; therefore, his claim of ineffective assistance of counsel is not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Our review of an unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *Id.* at 368. A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact, if any, for clear error, and review the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo. *Id.*

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005), quoting *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.*, quoting *Solmonson*, 261 Mich App at 663-664.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, 250 Mich App at 368. Here, defense counsel had a purpose in condoning the introduction of the fourteen 911 calls by Smith and the others, i.e., to undermine Smith's trial testimony and suggest that Smith lied about defendant possessing a weapon. Defense counsel cross-examined Smith about his actions while making the calls to cast doubt on Smith's trial testimony that he continued to stand on the porch making 911 calls as defendant allegedly approached him holding an AK-47. During closing argument, trial counsel pointed out how unlikely Smith's behavior would have been at a time where it would be natural to run away, duck, or freeze. In addition, counsel used the timing of the calls and the fact that seven 911 calls were made before anyone mentioned a gun to support the theory that Smith lied about defendant possessing a weapon to get the police to respond faster to what they would have otherwise thought was a less pressing situation. Counsel also appeared to argue that the

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

911 calls revealed a weakness in the prosecution's case because only one eyewitness appeared to testify, when there were supposedly many witnesses to defendant's possession of the AK-47:

Another thing about the 911 calls, you heard a whole lot of people arguing and fussing in the background, including the woman who didn't show up in court here today. . . . All these people talking about all this stuff, but who shows up in court? One guy, Xavier Smith. And he gets up and he tells a story about somebody coming up with this color AK and somehow one disappears and another one shows up.

Given trial counsel's use of the information in the 911 calls, we find that counsel's decision was strategic. That his strategy did not work did not render its use ineffective assistance. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Defendant's conviction for felon in possession of a firearm is reversed, his remaining convictions are affirmed, and this matter is remanded for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen  
/s/ Donald S. Owens  
/s/ Douglas B. Shapiro